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TAN SRI JOSEPH KURUP

v.

DANNY ANTHONY ANDIPAI; ATTORNEY GENERAL, MALAYSIA (INTERVENER)

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FEDERAL COURT, KOTA KINABALU
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
NIK HASHIM FCJ

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[CIVIL APPEAL NO: 01(F)-19-2008]
13 MARCH 2009

ELECTION: *Petition - Nomination papers - Rejection by returning officer because papers filed outside time frame - Subsequent acceptance by*

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Deputy Director of Election Commission - Whether acceptance lawful - Whether compliance of time frame mandatory - Whether Deputy Director could override time frame requirement - Election Offences Act 1954, s. 32(b) - Elections Act 1958, ss. 4, 5, 16 - Elections (Conduct of Elections) Regulations 1981, regs. 6(2)(b), (2A), 7

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The appellant appealed against the decision of the learned election judge who allowed the respondent's election petition for a declaration that the appellant's election in Malaysia's 12th General Election was void under s. 32(b) of the Election Offences Act 1954 ('Election Offences Act'). The appellant, a Barisan National

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candidate, won the parliamentary seat of P182 Pensiangan uncontested after the nomination papers of the respondent of Parti Keadilan Rakyat were rejected by the returning officer ('RO') on the grounds that they were submitted late. The respondent

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submitted his nomination papers at 10.25am outside the time frame of 9am to 10am as stipulated in reg. 6(2)(b) of the Elections (Conduct of Elections) Regulations 1981 ('Regulations'). On allowing the respondent's petition, the learned judge held that the wrongful rejection of the respondent's nomination papers breached

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his constitutional right to participate in the election and the written law relating to the conduct of the election under the Election Offences Act. The decision of the Deputy Director of the Sabah Election Commission to accept the respondent's nomination papers was final and could not be overturned by the RO under

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the pretext that there was an objection during the objection

period. The learned judge held that the Deputy Director was exercising a power provided by law in making the decision and that the RO's decision to uphold the objection was wrong in law.

Held (allowing the appeal)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) Section 32(b) of the Election Offences Act was mandatory and as such must be strictly adhered to and obeyed. In order to fall within the ambit of the provisions, it was incumbent on the petitioner to plead in his election petition that there was non-compliance with the provisions of any written law relating to the conduct of any election and such non-compliance affected the result of the election. The alleged non-compliance of any written law must be specified clearly in the petition as failure to specify such non-compliance will render the petition defective and invalid. In the present case, the respondent pleaded the facts and grounds of the petition but without specifying which provisions of written law relating to the conduct of the election was not complied with by the RO. The failure to do so was fatal. Parties were bound by their pleadings. Since the mandatory requirement stipulated in s. 32(b) of the Election Offences Act was not met, the learned judge ought to have dismissed the respondent's petition outright. (paras 14 & 15)

(2) The words in reg. 6 of the Regulations were very clear and unambiguous and effect must be given to the meaning of those words. Regulation 6(2)(b) imposed an absolute obligation on the candidate to deliver his nomination papers to the RO between 9am to 10am. The consequence of not delivering the nomination papers within the time stipulated was fatal as spelt out in reg. 6(2A)(a) which expressly forbids the RO to accept nomination papers not delivered within the time specified. The intention of the legislature was clearly reflected by the use of strong words "shall not accept" in reg. 6(2A) of the Regulations. (para 18)

(3) The time of delivery of the nomination papers was of the essence because reg. 7(1)(b) of the Regulations expressly provided that a ground for objecting the nomination papers was that they were not delivered in accordance with the Regulations. (para 19)

(4) The RO was statutorily empowered by reg. 7(4) of the Regulations to decide on the validity of every objection with the least possible delay. Regulation 7(5) provided that the decision of the RO shall be final and conclusive for the purpose of the election in respect of which the proceedings were being held. In the present case, the objection was grounded on the fact that the respondent's nomination papers were delivered at 10.25am outside the time stipulated under reg. 6(2)(b). Therefore, by its provisions, reg. 6(2)(b) and (2A)(a) did not give the RO any discretion or flexibility to accept nomination papers delivered outside the time frame requirement. Regulation 6 was very stringent as to the timing of the delivery of the nomination papers and specified the consequences of failing to do so. It was fallacious therefore to treat reg. 6 as a mere guideline. Regulation 6 was the law that governed the proceedings relating to conduct of elections on nomination day. (paras 20 & 21)

(5) Applying the principles in *Cutting v. Windsor* and *Harjit Singh v. S Umrao Singh*, the requirement that the nomination papers must be delivered between the hours of 9am and 10am was mandatory. Therefore, the RO was justified in upholding the objection and rejecting the respondent's nomination papers for non-compliance with reg. 6(2)(b) of the Regulations. (para 24)

(6) It was true that the Election Commission had the power of control and supervision over the conduct of the elections and that the RO was subjected to the direction of the Election Commission under ss. 4 and 5 of the Elections Act 1958. However, such power and direction must be exercised in accordance with the law. In the instant case, the directive of the Deputy Director of the Sabah Election Commission directing the RO to accept the respondent's nomination papers outside the time frame was contrary to reg. 6(2)(b) and 6(2A)(a) of the Regulations and was thus unlawful. The learned judge erred when he held that the power of the Election Commission overrides the Regulations. Nothing in the law provided for such a power. Besides, it was not within the purview of the Election Commission to effect any amendment to election regulations relating to the conduct of elections without due observation of s. 16 of the Elections Act 1958. (para 24)

(7) Although there were twelve other candidates and only one counter opened at the nomination center, the responsibility for submitting the nomination papers to the RO within the time frame lay with the candidates. No statutory duty was imposed on the RO to ensure that all nomination papers of all candidates present at the nomination center must be accepted. The RO was only to ensure that no nomination papers were to be accepted after the time frame. The fault lay with the respondent for failing to deliver his nomination papers within the time stipulated to the RO. It followed that there was no failure on the part of the RO to comply with the election laws. The RO had discharged his duties admirably well according to the law. (paras 25 & 26)

[Deposit returned to appellant. Orders of learned judge set aside. Appellant duly elected to parliamentary constituency of P182 Pensiangan.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu merayu terhadap keputusan hakim pilihanraya kerana membenarkan permohonan deklarasi petisyen pilihanraya responden bahawa pemilihan perayu di dalam Pilihanraya Umum ke 12 adalah tak sah di bawah s. 32(b) Akta Kesalahan Pilihanraya 1954 ('Akta Kesalahan Pilihanraya'). Perayu, seorang calon Barisan Nasional, telah memenangi kerusi Parlimen P182 Pensiangan tanpa bertanding selepas kertas pencalonan responden dari Parti Keadilan Rakyat ditolak oleh pegawai pengurus ('RO') atas alasan penyerahan kertas pencalonan berkenaan adalah terlewat. Responden menyerahkan kertas pencalonannya pada jam 10.25 pagi, iaitu di luar masa antara jam 9 hingga 10 pagi yang ditetapkan oleh per. 6(2)(b) Peraturan-Peraturan Pilihanraya (Perjalanan Pilihanraya) 1981 ('Peraturan'). Dalam membenarkan petisyen responden, yang arif hakim memutuskan bahawa penolakan kertas pencalonan responden telah melanggar hak keperlembagaan beliau untuk mengambil bahagian di dalam pilihanraya, serta bertentangan dengan undang-undang bertulis mengenai perjalanan pilihanraya di bawah Akta Kesalahan Pilihanraya. Diputuskan juga bahawa keputusan Timbalan Pengarah Suruhanjaya Pilihanraya Sabah untuk menerima kertas pencalonan responden adalah muktamad, dan tidak boleh diakas oleh RO, atas alasan bahawa ada bantahan dibuat di dalam tempoh bantahan. Yang arif hakim juga memutuskan bahawa Timbalan Pengarah dalam membuat keputusan telah melaksanakan kuasa yang

A diperuntukkan oleh undang-undang kepadanya, sementara keputusan RO membenarkan bantahan pula adalah silap di sisi undang-undang.

Diputuskan (membenarkan rayuan)

B **Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:**

(1) Section 32(b) Akta Kesalahan Pilihanraya adalah mandatori dan kerana itu hendaklah diikuti dan dipatuhi dengan ketatnya. Untuk dirangkumi oleh peruntukan, pempetisyen hendaklah
C memplidkan dalam petisyen pilihanrayanya bahawa terdapat ketidakpatuhan terhadap mana-mana undang-undang bertulis berkaitan perjalanan pilihanraya dan ketidakpatuhan tersebut telah menjejaskan keputusan pilihanraya. Ketidakpatuhan yang
D didakwa terhadap mana-mana undang-undang bertulis hendaklah diurai dengan jelas di dalam petisyen, kerana kegagalan berbuat demikian akan menyebabkan petisyen menjadi cacat dan tak sah. Dalam kes semasa, responden memplidkan fakta dan alasan-alasan petisyen, tetapi tidak
E menyatakan peruntukan undang-undang bertulis mengenai perjalanan pilihanraya manakah yang tidak dipatuhi oleh RO. Kegagalan ini adalah fatal. Pihak-pihak adalah terikat dengan pliding mereka. Oleh kerana kehendak mandatori dalam s. 32(b) Akta Kesalahan Pilihanraya tidak dipenuhi, maka yang arif
F hakim seharusnya menolak mentah-mentah petisyen responden.

(2) Perkataan-perkataan di dalam per. 6 Peraturan adalah jelas dan tidak kabur dan kesan hendaklah diberi kepada maksud perkataan-perkataan tersebut. Peraturan 6(2)(b) meletakkan tanggungan mutlak ke atas calon untuk menyerahkan kertas
G pencalonannya kepada RO di antara jam 9 hingga 10 pagi. Akibat dari kegagalan menyerahkan kertas pencalonan dalam tempoh masa yang ditetapkan adalah fatal, sepertimana yang diperjelaskan oleh per. 6(2A)(a), yang secara ekspres melarang RO dari menerima kertas pencalonan yang tidak diserahkan
H dalam tempoh masa yang ditetapkan. Niat badan perundangan ini tercermin jelas melalui penggunaan ungkapan tegas "tidak boleh menerima" di dalam per. 6(2A) Peraturan.

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(3) Waktu penyerahan kertas pencalonan adalah penting kerana per. 7(1)(b) Peraturan secara ekspres memperuntukkan bahawa satu alasan untuk membantah kertas pencalonan ialah kertas pencalonan tersebut tidak diserahkan mengikut kehendak Peraturan.

(4) RO diberi kuasa statutori oleh per. 7(4) Peraturan untuk membuat keputusan atas kesahan setiap bantahan dengan seberapa segera yang boleh. Peraturan 7(5) memperuntukkan bahawa keputusan RO adalah muktamad dan konklusif bagi maksud pilihanraya berkaitan mana prosiding dijalankan. Dalam kes semasa, bantahan adalah berasaskan fakta bahawa kertas pencalonan responden hanya diserahkan pada jam 10.25 pagi dan di luar masa yang ditetapkan oleh per. 6(2)(b). Oleh itu, per. 6(2)(b) dan (2A)(a), melalui peruntukan-peruntukannya, tidak memberikan RO sebarang budibicara atau kebebasan untuk menerima kertas pencalonan yang diserahkan di luar tempoh masa yang ditetapkan. Peraturan 6 adalah amat ketat berkenaan dengan masa penyerahan kertas pencalonan dan menjelaskan mengenai akibat-akibat dari kegagalan mematuhinya. Dengan itu adalah khilaf untuk menganggap per. 6 sebagai satu panduan semata-mata. Peraturan 6 adalah undang-undang yang mengawalselia prosiding berkaitan perjalanan pilihanraya pada hari penamaan calon.

(5) Menggunapakai prinsip-prinsip di dalam *Cutting v Windsor* dan *Harjit Singh v S Umrao Singh*, syarat bahawa kertas pencalonan hendaklah diserahkan di antara jam 9 hingga 10 pagi adalah mandatori. Oleh itu, RO berjustifikasi dalam menerima bantahan dan menolak kertas pencalonan responden kerana tidak mematuhi per. 6(2)(b) Peraturan.

(6) Adalah benar bahawa Suruhanjaya Pilihanjaya mempunyai kuasa untuk mengawal dan menyelia perjalanan pilihanraya dan bahawa RO harus menerima arahan Suruhanjaya Pilihanraya berasaskan ss. 4 dan 5 Akta Pilihanraya 1958. Bagaimanapun, kuasa serta arahan tersebut mestilah dilaksanakan mengikut lunas undang-undang. Dalam kes semasa, arahan Timbalan Pendaftar Suruhanjaya Pilihanraya Sabah mengarahkan RO supaya menerima kertas pencalonan responden yang di luar masa adalah bertentangan dengan per. 6(2)(b) dan 6(2A)(a) Peraturan dan dengan itu adalah tidak sah. Yang arif hakim

A khilaf bilamana beliau memutuskan bahawa kuasa Suruhanjaya Pilihanraya mengatasi Peraturan. Tiada suatu apa pun di sisi undang-undang yang memberi kuasa sedemikian. Selain itu, bukanlah termasuk di dalam lingkungan tugas Suruhanjaya Pilihanraya untuk meminda peraturan-peraturan pilihanraya
B berkaitan dengan perjalanan pilihanraya tanpa mematuhi dengan sewajarnya s. 16 Akta Pilihanraya 1958.

(7) Walaupun terdapat dua belas calon lain dan hanya satu kaunter dibuka di pusat penamaan calon, tanggungjawab untuk
C menyerahkan kertas pencalonan kepada RO dalam tempoh masa yang ditetapkan terletak atas calon-calon sendiri. Tiada tanggungjawab statutori dipikul oleh RO untuk memastikan bahawa semua kertas pencalonan dari semua calon-calon yang hadir di pusat hendaklah diterima. RO hanya perlu memastikan
D bahawa tiada kertas pencalonan diterima selepas tempoh masa yang ditetapkan. Maka kesilapan adalah berada di pihak responden kerana gagal menyerahkan kertas pencalonannya kepada RO di dalam tempoh masa. Ianya mengikut bahawa tiada kegagalan untuk mematuhi undang-undang pilihanraya
E telah berlaku di pihak RO. Sekaligus, RO telah menunaikan tanggungjawabnya dengan cemerlang dan mengikut undang-undang.

[Deposit dikembali kepada perayu. Perintah-perintah yang arif hakim
F *diketepikan. Perayu dipilih dengan teratur ke kerusi Parlimen P182 Pensiangan.]*

Case(s) referred to:

Bong Geok Beng v. Ahmad Nordin Mohamed Amin & 3 Ors [1978] 1 LNS 18 HC ***(refd)***

G *Chong Thain Vun v. Watson & Anor and Other Appeals [1968] 1 MLJ 65*

Cutting v. Windsor [1924] 40 TLR 395 ***(foll)***

Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors [2005] 2 CLJ 237 FC ***(refd)***

Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1) [2000] 3 CLJ 519 HC ***(refd)***

H *Harjit Singh v. S Umrao Singh AIR [1980] SC 701* ***(foll)***

Muip Tabib v. Dato James Wong; Wan Hamid Tuanku Surur v. Francis Loke [1970] 1 LNS 83 HC ***(refd)***

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Legislation referred to:
Election Offences Act 1954, s. 32(b)
Election Offences Ordinance 1954, s. 32
Elections Act 1958, ss. 4, 5, 16
Elections (Conduct of Elections) Regulations 1981, regs. 6(2)(b), 6(2A)(a), 7(1)(b), (5), (4)

Municipal Corporations Act 1882 [UK], r. 7
Representation of the People Act 1951 [Ind], s. 33(1)

For the appellant - Firoz Hussein (Hjh Mariati Robert, Lau Cheung Hoon & Kurup Robert Marcus & Co
For the respondent - Hj Ansari Abdullah (Datuk Chau Chin Tang, Jonathan Yassin & Erveana Ansari with him); M/s Ansari & Co
For the intervener - Azizah Hj Nawawi (Amarjeet Singh with him) SFC

[Appeal from Election Court, Kota Kinabalu; Election Petition No: K26-02-2008]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim FCJ:

Application For Intervention By The Attorney General

[1] At the outset of the appeal, the learned Attorney General of Malaysia, by encl. 10(a), applied to intervene in the appeal. After hearing the parties, we allowed the application, with costs in the cause, on the ground that this appeal involved public interest pertaining to the conduct of the general election in the country, and that the Attorney General, being the legal adviser to the Government, was most appropriate to intervene and be added as a party in the appeal.

Background

[2] In the last 12th general election of 8 March 2008, the appellant, who was the Barisan Nasional candidate, won the parliamentary seat of P182 Pensiangan uncontested after the nomination papers of the respondent of Parti Keadilan Rakyat and Saineh bin Usau who stood as an Independent candidate, were rejected by the Returning Officer Bubudan OT Majalu (the RO) on the grounds that they were submitted late.

[3] The respondent filed an election petition dated 9 April 2008 seeking a declaration that the election of the appellant be declared void under s. 32(b) of the Election Offences Act 1954 (the Act).

[4] On 8 September 2008, the learned election judge David Wong Dak Wah declared that the election result of the Pensiangan parliamentary seat was void under s. 32(b) of the Act, and that the appellant was not duly returned as the winning candidate for the parliamentary seat and ordered costs to the respondent.

[5] In his 36-page judgment, the learned judge held that the wrongful rejection of the nomination papers of the respondent had breached the respondent's constitutional right to participate in the election and the written law relating to the conduct of the election under the Act. The decision of the Deputy Director of Sabah Election Commission to accept the respondent's nomination papers was final and could not be overturned by the RO under the pretext that there was an objection during the objection period. The learned judge ruled that the Deputy Director was exercising a power provided by law in making the decision and the RO's decision to uphold the objection was wrong in law.

Contentions Of Parties

[6] Learned counsel for the appellant, Encik Firoz Hussein, contended that the respondent had never pleaded in his election petition precisely which provisions of the written law relating to the conduct of any election had been breached. Further, the learned judge did not rule in his judgment as to which provisions of the written law relating to the same had not been complied with. In this case, learned counsel said the respondent himself did not comply with the provisions of the written law as he had submitted his nomination papers at 10.25am instead of the time frame between 9am and 10am as provided for in reg. 6(2)(b) of the Elections (Conduct of Elections) Regulations 1981 (the Regulations).

[7] Learned Senior Federal Counsel, Puan Azizah Haji Nawawi, for the intervener said that the RO was statutorily empowered by reg. 7(4) of the Regulations to decide on any objection made in writing, which the RO decided in favour of the appellant.

[8] In rebutting the appellant's and the intervener's arguments, learned counsel for the respondent, Tuan Hj. Ansari Abdullah, submitted that under s. 5 of the Elections Act 1958 (Act 19), it was the duty of the Election Commission to ensure all the election officers act in a fair and impartial manner. Under s. 4 of Act 19 the RO was subjected to the direction of the said Deputy Director of the Sabah Election Commission. He added that although under the Regulations nomination papers must be submitted within the time frame, the Deputy Director had the discretion as to the acceptance of nomination papers so that the election was held in a fair and impartial manner. In this case, learned counsel said that there was a directive from the said Deputy Director to accept nomination papers of candidate who came to the nomination centre before 10am.

Decision Of This Court

[9] The respondent's election petition was based on s. 32(b) of the Act which states:

Avoidance of election petition

32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

(a) …

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election.

(c) …

(d) …

(e) …

[10] Alauddin Mohd Sheriff FCJ (now PCA), in delivering the judgment of the Federal Court case of *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 2 CLJ 237, opined on s. 32(b) of the Act at p 245 as follows:

A The provision clearly places the burden on the appellant to prove to the satisfaction of the election judge that:

(i) there has been non-compliance with the provision of the written law relating to the conduct of the elections; and

B (ii) the said non-compliance has affected the result of the elections.

There is no doubt in our minds that the two (2) limbs in s. 32(b) are to be read conjunctively and not disjunctively.

C There is no dearth of authorities to support such interpretation.

[11] In *Bong Geok Beng v. Ahmad Nordin bin Mohamed Amin & Anor and 3 Ors* [1978] 1 LNS 18, a number of election petitions had been brought alleging that the returning officer had wrongly rejected the nominations of the petitioners and had declared the return of the other candidates unopposed. Wan Yahya J (as he then was) held that:

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Section 32 of the Election Offences Act, 1954, requires the petitioner not only to state specifically in his petition which provisions of the law on which non-compliance is alleged to have taken place but also to supply adequate information as to how the respondent is said to have offended that law. In these cases the petitions were defective for want of specific charges.

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[12] Similarly in *Muip bin Tabib v. Dato James Wong; Wan Hamid bin Tuanku Surur v. Francis Loke* [1970] 1 LNS 83, the petitioner therein relied on s. 32 of the Election Offences Ordinance 1954 and alleged, *inter alia*, that the returning officer was wrong in rejecting the nomination papers. Justice B.T.H. Lee in dismissing the petitions, held that:

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the petitions were defective as neither of them alleged non-compliance with the provisions of any written law relating to the election nor was there any allegation that the result of the election had been affected.

H Justice B.T.H. Lee further said that:

To show that the returning officer was guilty of "noncompliance with the provisions of any written law relating to any election …", it is I think necessary for the petitioners to refer to the specific written law. In neither of the petitions has any reference been made to such written law.

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[13] On the statutory requirements of an election petition, Augustine Paul J (now FCJ) in *Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1)* [2000] 3 CLJ 519 at pp 523-524 reminded as follows:

> ... the statutory requirements of an election must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity.

See also *Chong Thain Vun v. Watson & Anor and 2 Other Appeals* [1968] 1 MLJ 65 where it was held that the Election Petition Rules 1954 are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rules or the Election Offences Ordinance 1954 must necessarily result in a jurisdictional defect and the court has no power to entertain the petitions.

[14] Likewise here, s. 32(b) of the Act is mandatory in its provisions and as such, its provisions must be strictly adhered to and obeyed. Thus, in order to fall within the ambit of the provisions, it is incumbent on the petitioner to plead in his election petition that there has been non-compliance with the provisions of any written law relating to the conduct of any election and such non-compliance affected the result of the election. The alleged non-compliance of any written law must be specified clearly in the petition as failure to specify such noncompliance will render the petition defective and invalid.

[15] In the present case, the respondent had pleaded the facts and the grounds of the petition but without specifying which provisions of written law relating to the conduct of the election had not been complied with by the RO. The failure is fatal. Parties are bound by their pleadings. Since the mandatory requirements stipulated by s. 32(b) of the Act had not been met, the learned judge ought to have dismissed the respondent's petition outright.

[16] For ease of reference, we reproduce reg. 6 of the regulations (Editor's note: Reg 6 has been subsequently amended by P.U.(A) 67/2004) which reads as follows:

> **Proceedings on nomination day**
>
> 6(1) ...
>
> (2) The nomination papers in triplicate must be delivered to the returning officer:
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> (a) at the place of nomination; and

A (b) **between the hours of nine o'clock and ten o'clock in the forenoon** on the day of nomination,

by the candidate and his proposer and seconder or by any two or any one of them.

B (2A) The returning officer **shall not accept** the nomination papers of any candidate:

(a) which are not delivered within the period specified in paragraph (2)(b); (emphasis added)

C **[17]** On the legal effect of reg. 6(2) and 6(2A)(a) of the regulations, the learned judge ruled as follows:

In my view the only way to avoid such chaos and abuse is to treat regulation 6(2) and 6(2A)(a) of the 1981 Regulations as
D mere guidelines which ought to be followed but if the circumstances demand acceptance of nomination papers after 10.00 a.m., the 2nd Respondent (the RO) or the Election Commission can accept those nomination papers. This was what the Deputy Director of the Election Commission in her wisdom did in this case and in my view she cannot be faulted. Her decision was
E what common sense demanded in the circumstances and likewise so in my interpretation of regulation 6(2) and 6(2A)(a) of the 1981 Regulations. Further if one looks at section 16 of the Elections Act, the power of the Election Commission overrides the regulations. It provides as follows:

F 16. Power to make regulations relating to the conduct of elections.

(1) The Election Commissions may with the approval of the Yang di-Pertuan Agong make regulations for the conduct of elections to the Dewan Rakyat and the Legislative
G Assemblies, and for all matters incidental thereto.

(2) Without prejudice to the generality of the foregoing powers the regulations may:

(a) …
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(b) prescribe the procedure for the nomination of candidates and for the making of and decision on, objections to any nominations;

(bb) …
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> Hence in making the decision to accept the nomination papers of the Petitioner, Saineh Usau and Paul Gitang, the Deputy Director was exercising a power provided for by law.

[18] The words in this reg. 6 are very clear and unambiguous and effect must be given to the meaning of those words. Regulation 6(2)(b) imposes an absolute obligation on the candidate to deliver his nomination papers to the RO between 9am to 10am. The consequence of not delivering the nomination papers within the time stipulated in reg. 6(2)(b) is fatal as spelt out in reg. 6(2A)(a) of the regulations, which expressly forbids the RO to accept nomination papers which are not delivered within the time specified. The intention of the legislature is clearly reflected by the use of strong words "shall not accept" in reg. 6(2A)(a) of the regulations.

[19] The time of the delivery of the nomination papers is also of the essence because reg. 7(1)(b) of the regulations expressly provides that a ground of objection to the nomination papers is that the nomination papers were not delivered in accordance with the regulations.

[20] It is also important to note that the RO is statutorily empowered by reg. 7(4) of the regulations to decide on the validity of every objection with the least possible delay; whereas reg. 7(5) provides that the decision of the RO shall be final and conclusive for the purpose of the election in respect of which the proceedings are being held. In this case, the objection was grounded on the fact that the respondent's nomination papers were delivered at 10.25am, which was outside the time stipulated under reg. 6(2)(b) of the regulations.

[21] Thus, by its provisions, reg. 6(2)(b) and (2A)(a) does not give the RO any discretion or flexibility to accept nomination papers not delivered within the time stipulated. Regulation 6 is very stringent as to timing of the delivery of the nomination papers and specifies the consequences of failing to do so. It is fallacious therefore to treat reg. 6 as a mere guideline. Regulation 6 is the law that governs the proceedings relating to conduct of elections on nomination day.

[22] In *Cutting v. Windsor* [1924] 40 TLR 395, a similar provision to reg. 6(2)(b) of the regulations was considered and was held to be mandatory. In that case, r. 7 in Part 11 of the Third Schedule to the U.K. Municipal Corporations Act 1882 provided:

> Every nomination paper … must be delivered by the candidate ….. at the town clerk's office, … seven days at least before the day of election, and before 5 o'clock in the afternoon of the last day for delivery of nomination papers.

It was held in that case that r. 7 was mandatory. It was not within the discretion of the town clerk to receive nomination papers after the hour specified in the rule, nor was it competent to the court to say that the delivery of a nomination paper after the prescribed time constituted a good nomination.

[23] The case of *Cutting, supra,* was followed by the Supreme Court of India in *Harjit Singh v. S.Umrao Singh* AIR [1980] SC 701 in relation to s. 33(1) of the Representation of the People Act (1951) of India, which similarly provided for a specified period of the day, ie, between eleven o'clock in the forenoon and three o'clock in the afternoon, for nomination papers to be delivered. Shinghal J said at p 704:

> 8. We have considered the argument that such a defect was not of a substantial character within the meaning of sub-section (4) of Section 36 of the Act, but we are unable to uphold it in the face of the clear requirement of ground (b) of sub-section (2) of Section 36, referred to above. It has to be appreciated that any other view would make the requirement for the presentation of the nomination papers before the last date for making nominations, and within the specified period of time, unworkable for it will not then be possible to draw a line up to which the delay in the delivery of the nomination papers could be condoned. In fact if the requirement of the law in that respect is not observed, and its breach is considered to be a defect which was not of a substantial character, it may be permissible to go to the extent of arguing that the nomination paper may be filed even up to the date and time fixed for the scrutiny of the nominations. That would not only cause administrative inconvenience but put the other candidates to a serious disadvantage for they would not be able to prepare themselves for any objection they may like to raise to the validity of the nomination at the time of the scrutiny of the

> nominations. We have no hesitation therefore in taking the view that the failure to comply with the requirement that the nomination papers shall be delivered between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon is mandatory and the Returning Officer was justified in rejecting the nomination paper in question because of its breach.

[24] So applying the principles in *Cutting* and *Harjit Singh*, *supra*, to the facts of the present case, the requirement that the nomination papers must be delivered between the hours of nine o'clock and ten o'clock in the forenoon is mandatory and therefore, the RO was justified in upholding the objection and rejecting the respondent's nomination papers for noncompliance with reg. 6(2)(b) of the Regulations. While it is true that the Election Commission has the power of control and supervision over the conduct of the elections and that the RO is subjected to the direction of the Election Commission under ss. 5 and 4 of Act 19 respectively, nevertheless, such power and direction must be exercised according to law. In the instant case, the directive of the Deputy Director of the Sabah Election Commission directing the RO to accept the respondent's nomination papers outside the time frame was contrary to reg. 6(2)(b) and 6(2A)(a) of the regulations and was thus unlawful. The learned judge was therefore erroneous when he held that the power of the Election Commission overrides the Regulations. Nothing in the law provides for such a power. Besides, it is not within the purview of the Election Commission to effect any amendment to election regulations relating to the conduct of elections without due observation of s. 16 of Act 19.

[25] While it is true that there were twelve citizens of the land who wanted to be candidates in the 12th general election and only one counter was opened at the nomination centre, nevertheless, the responsibility for submitting the nomination papers to the RO within the time frame lies with the candidates. No statutory duty is imposed on the RO to ensure that all nomination papers of all candidates present at the nomination centre must be accepted but only to ensure that no nomination papers are to be accepted after the time frame: reg. 6(2A)(a) of the regulations. So, in this case, the fault lies with the respondent for failing to deliver his nomination papers within the stipulated time to the RO.

A **[26]** Thus, there had not been any failure on the part of the RO to comply with the election laws. Indeed, the RO had discharged his duties admirably well according to the law. Accordingly, we unanimously allow the appeal with costs here and in the court below. The deposit is to be returned to the appellant. The orders
B of the learned judge are set aside. We hereby hold that the appellant Tan Sri Joseph Kurup was duly elected to the parliamentary constituency of P182 Pensiangan.

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